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IN THE

SUPREME COURT OF THE UNITED STATES

| | |
|---|---|
| UNITED STATES NAVIGATION COMPANY, INC., Petitioner, against THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELLERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR, Respondents. | October Term, 1931 No. 296 |

# BRIEF FOR PETITIONER

## I. THE REPORTS OF THE OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 53-71) is reported in 50 F. (2d) 83.

The opinion of the District Court (R. 42-48) is reported in 39 F. (2d) 204.

## II. Jurisdiction of This Court

1. This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted October 26, 1931 (R. 72), 76 L. Ed. 36, not yet officially reported.

2. The statutory provision believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, *U. S. Code,* Ti. 28, §347 (a).

3. The order for mandate of the Circuit Court of Appeals sought to be reviewed was entered on May 23, 1931 (R. 72). The petition for a writ of certiorari was filed in this Court on August 14, 1931 (R. 73).

4. The petition urged as reasons for granting this writ that:

(a) The questions raised are of sufficient importance to all interested in the foreign trade and commerce of the United States to merit their authoritative determination by this Court.

(b) The case presents questions of construction of important Federal statutes, namely, the Sherman Act, the Clayton Act, and the Shipping Act of 1916.

(c) The decision of the Circuit Court of Appeals, repealing by implication the Clayton Act so far as applied to combinations and restraints in foreign trade and ocean commerce, is unsound and in conflict with

principles established in *Great Northern Ry.* v. *Merchants Elev. Co.*, 1922, 259 U. S. 285; *Penna. R. R.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121, and other cases.

(d) The questions of jurisdiction presented have not been passed on, and should be passed on by this Court because of their public importance.

(e) In a similar action a contrary result has been reached by the United States District Court for the Eastern District of Louisiana in *New Orleans Corrugated Box Co., Inc.* v. *Luckenbach Steamship Co., Inc., et al.*, No. 19,745, November 7, 1930.

(f) The dissenting opinion in the court below suggests grave doubt as to the correctness of the majority opinion.

## III. Statement of the Case

### A. *The Proceedings*

By the writ of certiorari the petitioner, plaintiff in an action in equity, seeks to review a final decision of the Circuit Court of Appeals for the Second Circuit (R. 57-71) rendered by a divided court, which affirmed a decision of the United States District Court for the Southern District of New York, dismissing the amended bill of complaint.

The petitioner brought this action in the United States District Court for the Southern District of New York to enjoin the respondents from participating further in a combination and conspiracy in restraint of trade and attempt to monopolize the foreign trade and commerce of the United States in violation of the Act

of Congress, July 2, 1890, entitled "An Act to protect commerce against unlawful restraints and monopolies." *U. S. Code,* Ti. 15, §§1-7.*

The petitioner prays for injunctive relief under Section 16 of the Act of Congress, October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." *U. S. Code,* Ti. 15, §26.*

The bill of complaint charges violations of the anti-trust laws and seeks relief under those laws exclusively, and neither charges as such any violation of nor seeks any relief under the Shipping Act of 1916. *U. S. Code,* Ti. 46, §§801-842.*

A motion by the respondents, in the nature of a demurrer, to dismiss the bill of complaint was granted by Hon. Francis G. Caffey, United States District Judge, who filed a memorandum opinion on December 11, 1929 (R. 42-48). The opinion is reported in 39 F. (2d) 204. Pursuant to leave the petitioner then filed an amended bill of complaint which the respondents moved to dismiss on the same grounds, which were principally based upon the contention that the District Court is without jurisdiction to entertain the complaint because the subject-matter of the complaint is exclusively within the jurisdiction of the Shipping Board under the Shipping Act of 1916 (R. 40-41).

In his supplementary opinion dated January 16, 1930, Judge Caffey dismissed the amended bill of complaint on the ground that it did not raise any questions essentially different from those dealt with in the earlier opinion (R. 41-42).

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* The pertinent sections of these statutes are printed as Appendix A, *infra,* pp. 58-61.

From the final decree dismissing the amended bill of complaint the petitioner appealed to the Circuit Court of Appeals (R. 49).

While the appeal was pending in the Circuit Court of Appeals but before a hearing or decision by that court, the petitioner, on April 19, 1930, filed a petition for a writ of certiorari to review the case in advance of consideration by that court. This Court denied the petition on May 19, 1930, 281 U. S. 759.

The appeal was heard by the Circuit Court of Appeals on October 22, 1930, and was decided May 18, 1931 (R. 53), 50 F. (2d) 83.

## B. *The Facts*

As the decision below arose on a motion to dismiss in the nature of a demurrer, there are no facts in dispute, and the questions presented on this record relate solely to the jurisdiction of the District Court to entertain the complaint.

The petitioner is a New York corporation and since May, 1919, has operated an independent line of steamships in the general cargo trade between New York and London and Liverpool (R. 1).

The complaint alleges a combination and conspiracy of the associated lines, which together carry 95% of the general cargo trade from North Atlantic ports in the United States to ports of Great Britain and Ireland (R. 6). The petitioner and the combined lines are the only carriers maintaining regular general cargo services in this trade (R. 6). The object of the combination, it is alleged, is to drive the petitioner out of this trade and monopolize the same (R. 7).

The principal means alleged to be used by the combination is a scheme of joint exclusive patronage contracts by which the combination requires shippers to agree to ship exclusively by the lines of the combination and to refrain from making any shipment in this trade by a vessel of the petitioner. This agreement not to ship by the vessels of the petitioner is demanded as the consideration for a schedule of rates lower than those charged shippers who will not agree so to restrict all of their shipments. The line of the petitioner in this trade runs only from New York to London and Liverpool. If a shipper gives any part of his shipments to these ports to the petitioner, he is unable to ship to Glasgow, for example, by any of the combined lines except at the higher rates, although such line runs its ships only to Glasgow (R. 7-10).

The power and combined economic resources of all the combined lines acting in concert and combination pursuant to these agreements and understandings have deprived shippers in this trade of freedom of selection of the particular carrier whose facilities best fit their requirements (R. 6).

Other practices complained of are manipulation of the general tariff and contract rates to coerce shippers into making exclusive contracts (R. 11), persuading shippers to disregard instructions of their buyers to ship by the petitioner's line (R. 11), inducing cancellation of contracts between shippers and the petitioner (R. 11-12), granting rebates (R. 12), circulating false statements as to the petitioner (R. 12), coercive use of patronage (R. 12-13), application of coercion to shippers in other trades (R. 13), and threats to blacklist forwarders (R. 13).

The amended complaint sets forth, in Part IV thereof (R. 13-27), a number of specific overt acts in furtherance of the combination, conspiracy, and attempt to monopolize the trade.

The agreements and understandings constituting the combination and conspiracy in restraint of trade and the attempt to monopolize trade and commerce, alleged in the amended bill to have been entered into since the enactment of the Shipping Act, have not been filed for approval with or approved by the United States Shipping Board (R. 27), as required by Section 15 of the Shipping Act of 1916, *U. S. Code,* Ti. 46, §814; so that these agreements do not fall within the only exemption from the anti-trust laws provided for in the Shipping Act.

The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by jointly requiring these exclusive patronage contracts. The allegations as to the rates themselves are merely descriptive of some of the means used to coerce the shippers into making the contracts. The reasonableness of either the contract rate or general tariff rate is not in issue. The rates may in fact be unreasonable, but this is neither the basis nor a necessary element of the cause of action.

## IV. The Opinions of the Courts Below

### A. *The District Court*

The District Court held:

1. If the Shipping Act be disregarded, the bill states a cause of action under Sections 1 and 2 of the Sherman

Act for which Section 16 of the Clayton Act entitled the petitioner to an injunction (R. 43).

2. Nevertheless, "the court is required to refrain from permitting itself to be used as a forum for litigation about the agreements until after they have been ordered to be filed or have been acted upon by the board or it has had opportunity to pass upon them in the way contemplated by section 15" (R. 47).

3. Because the bill includes among its important allegations acts which constitute or may constitute violations of the Shipping Act as well as of the Sherman Act (R. 44), the petitioner is not entitled to the relief sought under the Sherman Act.

4. An essential element of the complaint is the excessive spread between the open and contract rates, the determination of which requires an examination of the reasonableness of one or both of the rates. By analogy to cases involving land carriers subject to the jurisdiction of the Interstate Commerce Commission, these are administrative questions for determination exclusively by the Shipping Board (R. 44).

B. *The Circuit Court of Appeals*

The decision of the Circuit Court of Appeals was rendered by a divided court, Judge Swan dissenting. The majority opinion, rendered by Judge A. N. Hand, with whom Judge L. Hand concurred, held:

1. The agreement set forth in the amended bill of complaint involves a violation of the Sherman Anti-Trust Act, at least in the absence of approval by the United States Shipping Board pursuant to Section 15 of the Shipping Act (R. 57).

2. Notwithstanding such violation of the Sherman Act a private party is not afforded a remedy under Section 16 of the Clayton Act because that section excepts matters subject to the jurisdiction of the Interstate Commerce Commission and a similar exception should be implied in respect of matters subject to the jurisdiction of the Shipping Board (R. 57-62).

3. The implication of such an exception arises because (a) "the Supreme Court has been increasingly disposed to treat the remedies afforded by that [Interstate Commerce] act as exclusive" (R. 58), in spite of the provision therein saving other remedies existing at common law or by statute, and (b) the Shipping Act does not contain such a clause saving other remedies (R. 63).

4. In the case of land carriers the decisions of the Supreme Court now require prior resort to the Interstate Commerce Commission wherever complicated questions of fact arise and experience in technical matters is required, including practically all questions of reasonableness (R. 60).

5. If the agreement complained of in the bill had related to land carriers it would have had to be passed on by the Interstate Commerce Commission before resort to the courts (R. 62), because (a) "the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage" (R. 63) and (b) restraints of trade, unless unreasonable, are not contrary to the Sherman Act (R. 62).

6. The Shipping Act not only does not save other remedies but also provides ample remedies of its own and sets up a standard based on the welfare of the in-

dustry rather than on restraint of competition, which standard can be applied only by a special fact-finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry (R. 63-64).

7. Notwithstanding the provisions of Section 15 of the Shipping Act that agreements made after the organization of the Shipping Board

> "shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *," *U. S. Code*, Ti. 46, §814,

and notwithstanding the allegations of the amended bill, admitted by demurrer, that the agreements and understandings between the respondents, pursuant to which the acts complained of have been carried out, have not been filed with or approved by the Board, nevertheless a private suitor may not invoke the jurisdiction of the District Court because the Shipping Act provides complete remedies for all the alleged wrongs, and in the absence of investigation by the Shipping Board it is impossible to say whether there is a "substantial grievance" (R. 64).

8. "* * * if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the Shipping Act has been violated as well" (R. 67). Further, "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as

other relief might be had, and still harder to imagine that these remedies might be pursued pari passu" (R. 67). Therefore, "A choice must be made between the two possible remedies of a suit under the Anti-Trust Acts and a proceeding before the Shipping Board" (R. 69).

9. Notwithstanding the jurisdiction conferred upon the courts by the Sherman and Clayton Acts, "every reason of policy and convenience should prompt the courts to 'take arms against a sea of troubles' by requiring resort to the Shipping Board in situations like the present" because of the nature of the questions involved and the broad powers given to the Shipping Board under the Shipping Act (R. 69).

In his dissenting opinion Judge Swan considered:

1. As the acts complained of are forbidden by the Sherman Anti-Trust Act, the petitioner should have an injunction unless this remedy has been taken away from it because similar relief may be obtained from the Shipping Board (R. 71).

2. The Shipping Act of 1916 does not expressly repeal existing rights and remedies, and as repeals by implication are not favored, the remedies to which the petitioner would otherwise be entitled should not be denied. The remedy of injunctive relief should not be refused to it merely because similar relief of injunctive character might be obtained from the Shipping Board (R. 71).

3. "* * * the similar injunctive relief which I have assumed the plaintiff might obtain from the Board, though the language of the act does not seem to be so

clear as to put the matter entirely beyond question, should be considered an additional remedy, not a remedy in substitution for that which the plaintiff might seek in the courts" (R. 71).

4. "An injunction forbidding the carriers from acting under the agreement unless and until they shall file it and obtain the Board's approval of it would in no way hamper the Board's administrative functions; indeed, under the allegations of the complaint (admitted by the demurrer), the Board could not legally approve the agreement" (R. 71).

## V. Specification of Errors

The decision of the Circuit Court of Appeals is erroneous in finding and holding that:

1. Although the agreements and understandings among the respondents involve a violation of the Sherman Anti-Trust Act and have not been made lawful by approval by the Shipping Board under the provisions of the Shipping Act of 1916, nevertheless the District Court is without jurisdiction to grant injunctive relief to a private party injured by such agreements and acts committed pursuant thereto, notwithstanding that such jurisdiction is expressly conferred by Section 16 of the Clayton Act, *U. S. Code*, Ti. 15, §26.

2. The exception contained in Section 16 of the Clayton Act, whereby no person except the United States is entitled to bring suit in the courts for injunctive relief against rail carriers subject to the jurisdiction of the Interstate Commerce Commission, is extended so as to deny jurisdiction of the courts to grant injunctive relief against common carriers by water in foreign commerce.

3. The District Court is without jurisdiction to grant injunctive relief under the Clayton Act, based on violations of either or both Sections 1 and 2 of the Sherman Act, on the ground that the Shipping Act of 1916 granted to the Shipping Board power to afford remedies for all the wrongs recited in the amended bill of complaint.

4. If the agreements and understandings complained of had related to land carriers, they would have had to have been passed on by the Interstate Commerce Commission before resort to the courts.

5. "The gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates" (R. 63).

6. By enacting the Shipping Act of 1916, Congress set up a standard for the shipping business, which standard can be applied only by a special tribunal; and the courts are incompetent to determine whether such agreements and understandings violate that standard.

7. The Shipping Act of 1916 ousted the courts of jurisdiction to entertain the amended bill of complaint alleging violations of and asking relief under only the anti-trust laws, until the remedies afforded under the Shipping Act should have been exhausted.

8. By analogy to the reasoning of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and other decisions on questions arising under the Interstate Commerce Act, the petitioner is confined for its remedy to resort to the United States

Shipping Board and the court is without jurisdiction to entertain the amended bill of complaint, although, as contended by the petitioner:

(a) The agreements and understandings complained of had not been approved by the Shipping Board so as to be lawful under Section 15 of the Shipping Act and thus excepted from the operation of the anti-trust laws (R. 27, 57, 64),

(b) The United States Shipping Board has already declared unlawful similar use of the joint exclusive contract (R. 28),

(c) The agreements and understandings alleged are of such a character that they could not lawfully be approved by the United States Shipping Board (R. 28),

(d) The agreements and understandings alleged are of such a character that any construction of the Shipping Act of 1916 which would render them lawful would *ipso facto* render that statute unconstitutional for indefiniteness,

(e) No administrative question is presented for decision, and

(f) The use of unapproved agreements and understandings and other practices complained of are expressly made unlawful *per se* by the specific terms of the Shipping Act itself (R. 67).

## VI. Argument

## PART I

## THE SITUATION IRRESPECTIVE OF THE SHIPPING ACT

### FIRST POINT

BOTH COURTS BELOW CORRECTLY HELD THAT, ASIDE FROM ANY EFFECT OF THE SHIPPING ACT, THE COMPLAINT STATES A GOOD CAUSE OF ACTION WITHIN THE JURISDICTION OF THE DISTRICT COURT.

A. *The facts alleged in the amended bill clearly charge a violation of Sections 1 and 2 of the Sherman Act.*

The allegations of the amended bill of complaint, which must be taken as true on motion to dismiss, charge a monopolistic attempt by the combination and conspiracy of the respondents, carrying the overwhelming bulk of the general cargo trade in question, to force the petitioner out of the trade. The principal means employed is the agreement among the respondents, acting in concert, to make exclusive patronage the consideration for certain rates or other inducements, with the intention and having the effect of preventing shippers from using the petitioner's vessels (R. 7-10, 13-22). Agreements of similar type and intent have been held illegal, as unjust, discriminatory and unfair, (a) on common law principles before the Sherman Act was passed, *Menacho* v. *Ward,* 1886, 27 Fed. 529; and (b) as in violation of the Sherman Act, *Thomsen* v. *Cayser,* 1917, 243 U. S. 66; *United States* v. *Pacific & Arctic Co.,* 1913, 228 U. S. 87; *United States* v. *Great Lakes*

*Towing Co.*, 1913, 208 Fed. 733; 1914, 217 Fed. 656, 659. Rate-fixing agreements of a combination controlling 95 per cent. of the trade with Mediterranean ports were held to violate the Sherman Act in *European Commercial Co., Inc.* v. *International Mercantile Marine Co., et al.*, S. D. N. Y., 1923 A. M. C. 211.

B. *The facts alleged in the amended bill entitle the petitioner to injunctive relief in the District Court.*

1. There is no doubt that Section 16 of the Clayton Act, *U. S. Code*, Ti. 15, §26, confers on the District Court jurisdiction to enforce the provisions of the Sherman Act at the instance of a private party threatened with injury by a violation thereof, with one exception, viz., cases against carriers subject to the regulation of the Interstate Commerce Commission, within which the matter in controversy clearly does not fall.

2. Threatened irreparable injury to the petitioner is apparent from the allegations of serious interference with a going business (R. 7, 28). *Duplex Co.* v. *Deering*, 1921, 254 U. S. 443, 465.

3. The threatened injury to the petitioner's business is one for which there is no adequate remedy at law. The right of resort to the Shipping Board for relief does not bar the exercise of equity jurisdiction because it is not a remedy on the law side of the federal court. *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 1926, 270 U. S. 378, 388; *Chicago, B. & Q. R. R.* v. *Osborne*, 1924, 265 U. S. 14; *Smyth* v. *Ames*, 1898, 169 U. S. 466, 516.

Indeed, both courts below found that the amended complaint stated a cause of action under Sections 1 and

2 of the Sherman Act, for which Section 16 of the Clayton Act entitled the petitioner to an injunction unless the court was ousted of its jurisdiction by the Shipping Act (R. 43, 57).

Therefore, in order to sustain the conclusion of the courts below, the respondents must show affirmatively that the Shipping Act ousted the jurisdiction which previously existed in the District Court.

## PART II

## THE EFFECT OF THE SHIPPING ACT

### SECOND POINT

THE COURT IS NOT OUSTED OF JURISDICTION BY THE EXPRESS TERMS OF THE SHIPPING ACT.

The conclusion of the Circuit Court of Appeals that the Shipping Board "has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the act" (R. 69), is not only unsupported by any language in the Shipping Act, but also contrary to the express terms and clear intention of that act.

A. *The Shipping Act expressly confines the powers of the Board to the provisions of the Shipping Act itself and confers no general jurisdiction over monopolies and restraints in respect of ocean carriers.*

The Shipping Act, which deals with administrative regulation and supervision and confines the powers of

the Shipping Board to the provisions of the Shipping Act itself, contains nothing susceptible of the construction that the Board has general jurisdiction over monopolies and restraints of trade. Nor is there any language in the Act expressly or impliedly giving the Shipping Board jurisdiction over combinations of ocean carriers to the exclusion of the courts.

This is clear from the language in Sections 14a, 16, 17, 21-24, 26-28. *U. S. Code,* Ti. 46, §§813, 815, 816, 820-823, 825-827. By these provisions the Board is not vested with power to entertain complaints based upon the Sherman and Clayton Acts, or upon any other statutes, but is expressly limited to investigations and determinations of violations of the Shipping Act. Sections 14, 14a, 22, 27.

In the sections dealing with procedure is found the same limitation of the Board's jurisdiction to "this Act" (as the statute was originally passed, now changed to "this chapter" in the U. S. Code). *U. S. Code,* Ti. 46, §§822, 823, 825, 826, 827.

The provisions specified by the court below as instances of the broad powers of the Shipping Board conferred by the act (R. 66-67, 69), viz., "to 'make such order as it deems proper' to remedy private wrongs" and to enforce orders of the Board, scarcely lead to the conclusion reached that the Shipping Board's jurisdiction is exclusive. In fact, the express language of Section 15 in which is conferred the chief "broad power" relied on below, that of approving trade agreements (R. 68), shows that the Shipping Board's jurisdiction is not and was not intended to be exclusive.

B. *The only reference to monopolies and restraints in the Shipping Act is the exemption provided by Section 15 relieving approved agreements from the operation of the anti-trust laws, which exemption does not apply to the subject-matter of this suit.*

The only reference to the anti-trust laws found in the Shipping Act is as follows:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto." *U. S. Code,* Ti. 46, §814.

The only agreements "lawful under this section," which are so excepted from the operation of the anti-trust acts, are those which were either (1) in existence at the time of the passage of the Shipping Act on September 7, 1916, and not subsequently disapproved by the Board, or (2) thereafter filed with and approved by the Board. All other agreements are expressly declared to be unlawful by the following provisions of Section 15 of the Shipping Act:

> "All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation." *U. S. Code,* Ti. 46, §814.

Whatever room there might be for speculation as to whether or not Congress intended to confer exclusive jurisdiction on the Shipping Board if the Shipping Act had contained no reference whatever to the anti-trust laws is thus removed, because the foregoing provisions, coupled with the fact that they are the only references to the matter in the statute, indicate a clear intention not to oust the courts of jurisdiction of combinations and conspiracies which have not been approved by the Board, but to remove from the jurisdiction of the courts only certain classes of agreements, and then only when and if they have been filed with and approved by the Board.

As the agreements here complained of have not been filed with and approved by the Board (R. 27), the exception of Section 15 does not apply, as both courts below specifically found (R. 42, 57). Hence, the jurisdiction of the court as to the agreements and understandings complained of under the anti-trust laws is not affected by the Shipping Act, and the decision below amounts to a repeal by implication of the Sherman Act in so far as it relates to combinations and conspiracies among ocean carriers.

Nevertheless, it was suggested below (R. 67) that despite the provision that unapproved agreements shall be unlawful, the mere possibility of subsequent approval by the Shipping Board *in medias res* worked a presently effective ouster of the jurisdiction of the District Court. The argument is unconvincing because in every suit for an injunction there is the possibility that the action will abate pending its adjudication; but such possibility is not sufficient to oust a court of jurisdiction *in limine*.

Furthermore, ouster by subsequent approval is a complication which is made possible only as a result of the

respondents' illegal acts in operating under the unapproved agreements, without which the argument could not be made. Their unlawful conduct should not provide the means of depriving petitioner of its remedy by ousting the court of jurisdiction.

The court below apparently failed to apprehend that, by the plain language of Section 15 of the Shipping Act of 1916, the exemptions from the anti-trust acts which are afforded by the Shipping Act come into being only by affirmative approval by the Shipping Board. Acts committed by the respondents which violate the anti-trust laws may be judicially condemned and remedies given by the court under those acts, consistently with the jurisdiction of the Shipping Board to condemn or approve similar acts under the powers conferred upon it. If the respondents wish to obtain whatever benefit may be thought to be derived from an investigation and determination by the Shipping Board of the acts complained of in the amended complaint, or the application of a possibly different standard of conduct by the Shipping Board from that required by the courts, it is for the respondents to file their agreements with the Board and obtain its approval as required by the precise terms of the Shipping Act. Until that is done, the anti-trust laws, including the Clayton Act, are completely operative.

Finally, the possibility of ouster of jurisdiction by subsequent approval is illusory, because the nature of the agreements and understandings alleged is such that the Shipping Board could not approve them within constitutional limitations; as is more fully discussed *infra*, pp. 47-49.

## THIRD POINT

THE COURT IS NOT OUSTED OF JURISDICTION BY IMPLICATION FROM THE TERMS OF THE SHIPPING ACT.

A. *The exception in Section 16 of the Clayton Act, whereby private parties are not permitted injunctive relief against land carriers in respect of matters subject to the jurisdiction of the Interstate Commerce Commission, should not be extended by implication to ocean carriage.*

Section 16 of the Clayton Act gives injunctive relief to private parties in general terms; but provides that a private party is not entitled to such relief "against any common carrier subject to the provisions of" the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." *U. S. Code*, Ti. 15, §26.

The Circuit Court of Appeals held that this case falls within the exception rather than within the general terms of Section 16. This extension of the exception beyond its express terms so as in effect to repeal the anti-trust laws *pro tanto* is implied from what the court describes as the increasing tendency of this Court to treat the remedies afforded by the Interstate Commerce Act as exclusive (R. 58). The Circuit Court of Appeals reasons that although the Interstate Commerce Act contains a saving clause expressly reserving remedies "existing at common law or by statute" and that its provisions "are in addition to such remedies," *U. S. Code*, Ti. 49, §22, this Court in many cases has treated the remedies afforded by that act as exclusive; and hence in the absence of a similar saving clause in the Ship-

ping Act the remedies of that statute *a fortiori* should be regarded as exclusive. This theory seems to underlie the entire opinion (R. 63, 67, 68-69). The petitioner contends that this reasoning does not warrant a construction which amounts to supplying by judicial legislation an exception in respect of ocean carriers similar to the exception in the case of land carriers subject to the regulation of the Interstate Commerce Act, which latter exception is expressly provided in the Clayton Act itself.

There is no language either in the Clayton Act as originally passed or in any amendments thereto, by which the courts are deprived of jurisdiction to grant relief against ocean carriers for violation of the anti-trust laws. In Section 16 of the Clayton Act the specific exception was evidently made because Congress recognized that the effect of this section would be to confer the fullest jurisdiction on the federal courts unless such a specific exception were made.

When the Shipping Act was passed, if Congress had intended to make an exception to the jurisdiction conferred by Section 16 of similar scope to that with respect to land carriers, it presumably would have effectuated such an intention either by amendment to Section 16 of the Clayton Act or by the terms of the Shipping Act itself.

B. *Such extension was accomplished by the court below only by implied repeal of the Clayton Act.*

The court below disregarded the fundamental distinction between a proper construction of the saving clause in the Interstate Commerce Act, limiting it so as to make it conform to the scheme and purpose of the stat-

ute as a whole, and the judicial repeal, without any legislative basis whatever, of an express remedy given by the Clayton Act. Reduced to its lowest terms, the statutory construction by the court below bases the implication of the repeal of the general provisions of Section 16 of the Clayton Act on the absence of a specific provision that the Clayton Act was still in force. Repeal of a prior statute by a subsequent one on any such theory is entirely inconsistent with the settled policy that implied repeals are not favored, to which Judge Swan directs attention in his dissenting opinion (R. 71). *United States* v. *Noce,* 1925, 268 U. S. 613, 619; *United States* v. *Greathouse,* 1897, 166 U. S. 601, 605; *Frost* v. *Wenie,* 1895, 157 U. S. 46, 58.

Furthermore, the specific reference in Section 15 of the Shipping Act, *U. S. Code,* Ti. 46, §814, to the anti-trust laws is an indication that Congress regarded those laws, including Section 16 of the Clayton Act, as in force, and affirmatively intended to continue them in force, in respect of ocean carriers, except in the express exception of approved agreements.

## FOURTH POINT

THE CIRCUMSTANCE THAT THE FACTS ALLEGED IN THE AMENDED BILL WERE OR MAY HAVE BEEN ALSO VIOLATIONS OF THE SHIPPING ACT IS NOT A SUFFICIENT REASON FOR DEPRIVING THE PETITIONER OF ITS LEGAL OR EQUITABLE REMEDIES UNDER THE ANTI-TRUST LAWS, OR FOR CONFINING THE PETITIONER TO PROCEEDINGS BEFORE THE SHIPPING BOARD UNDER THE SHIPPING ACT.

The decision of the Circuit Court of Appeals is based upon the theory that because resort might be had to the

Shipping Board under the Shipping Act for relief against violations of that act, therefore resort *must* be had to the Shipping Board to the exclusion of the jurisdiction conferred upon the courts by the anti-trust acts (R. 67).

The petitioner contends that the mere right to seek relief before an administrative tribunal does not oust the courts of their jurisdiction to grant relief under the anti-trust acts. It is submitted that the dissenting opinion of Judge Swan in the Circuit Court of Appeals was correct and that, under the principle that repeals by implication are not favored, such remedy as the Shipping Board may have power to afford the petitioner in proceedings under the Shipping Act should be considered as in addition to rather than as in substitution for existing remedies.

A. *Relief has been given under the Sherman Act, at common law, and in admiralty, in cases where the facts included violations of the Shipping Act.*

In what are believed to be the only cases presenting the situation of a plaintiff complaining of acts which were or might be considered also violations of the Shipping Act, the courts have not hesitated to entertain jurisdiction of suits (a) under the anti-trust acts: *Buyer* v. *Guillan,* C. C. A. 2nd, 1921, 271 Fed. 65 (injunction granted against conspiracy between longshoremen and steamship companies); *European Commercial Co., Inc.* v. *International Mercantile Marine Co., et al.,* S. D. N. Y., 1923 A. M. C. 211 (demurrer to complaint for treble damages against combination of steamship companies overruled); *New Orleans Corrugated Box Co., Inc.* v. *Luckenbach Steamship Co., Inc., et al.,*

E. D. La., No. 19745, Nov. 7, 1930 (motion to dismiss a shipper's bill of complaint under the anti-trust laws for injunctive relief against a combination of carriers using a system of exclusive patronage contracts denied); *Am. Pitch Pine Export Co., Inc.* v. *Dixie Steamship Co., et al.*, E. D. La., No. 20871, Dec. 24, 1931 (preliminary injunction granted against use of exclusive patronage contract as means of obtaining a monopoly); (b) on common law principles: *Burgess Bros. Co., Inc.* v. *Stewart*, N. Y., 1921, 114 Misc. 673 (injunction granted against conspiracy between longshoremen, terminal operators and steamship companies); and (c) in admiralty: *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, S. D. N. Y., 45 F. (2d) 242 (recovery allowed by carrier for difference between freight rate charged for ocean transportation and rate fixed by association filed with Shipping Board).

In the case last cited, the court took jurisdiction and enforced rights founded on the Shipping Act itself, of which the Board also had jurisdiction.

B. *The mere existence of a remedy at the hands of the Interstate Commerce Commission has not been considered a bar to relief under the Sherman Act, other remedial statutes, or on common law principles.*

The court below relied on the analogy of the Interstate Commerce Act to land carriers and deduced from that analogy that the court has no jurisdiction over the subject-matter of the complaint in the case at bar. But, notwithstanding the jurisdiction of the Interstate Commerce Commission, which comprehends much broader regulatory powers than those of the Shipping Board,

the federal courts have consistently administered the Sherman Act and applied it to illegal restraints of trade by land carriers. *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; *United States* v. *Union Pacific R. R. Co.*, 1912, 226 U. S. 61; *United States* v. *Joint Traffic Assn.*, 1898, 171 U. S. 505; *United States* v. *Trans-Missouri Freight Assn.*, 1897, 166 U. S. 290; *Meeker* v. *Lehigh Valley R. Co.*, C. C. A. 2nd, 1910, 183 Fed. 548.

The court below attempted to distinguish the application of these decisions to its analogy, on the ground that although the government may invoke the provisions of the Sherman Act, it does not necessarily follow that a private party may do so even in the field where there is no statutory proscription, citing *Keogh* v. *C. & N. W. Ry. Co.*, 1922, 260 U. S. 156, in support of its thesis (R. 62).

The decision in the *Keogh* case, however, does not establish this principle, and is not authority for ousting the jurisdiction of the court in the case at bar. Indeed, in that case no question of jurisdiction was raised.

The ground of the decision of the *Keogh* case was that the rates complained of had been approved by the Interstate Commerce Commission, Mr. Justice Brandeis saying:

> "The instrument by which Keogh is alleged to have been damaged is rates approved by the Commission." P. 161.

The plaintiff's legal rights were measured by the published tariff which had been approved by the Interstate Commerce Commission and was the legal rate and could not be varied by either the contract or tort of the car-

rier. The decision was based upon the absence of a wrong suffered by the plaintiff who, not having been "injured in his business or property," had no right of action under Section 7 of the Sherman Act. *Ibid.*, 163. This reasoning makes it clear that the remarks to the effect that approval of the rates by the Commission might not be a bar to proceedings by the government had reference to the question whether the acts complained of were illegal, and whether the party complaining of such illegality had in fact sustained injury to constitute a cause of action.

The result in the *Keogh* case was reached on the further ground that recovery by the plaintiff would, like a rebate, have produced unjust discrimination due to the vagaries of jury trials and variant measures of damages. *Ibid.*, 163. A contrary result in that case would have produced the very evil of unjust discrimination which is the cause of action in the case at bar. The very basis for denying recovery in the *Keogh* case is the basis for granting relief here.

In the *Keogh* case the Court further found that, in order to recover, the plaintiff would have been required to prove that the hypothetical lower rate to which he claimed to be entitled would be reasonable under the act to regulate commerce. An inquiry of this nature must be determined by the Commission, but by no conceivable proceedings could such a hypothetical question be submitted to it: in consequence of which the basis of the plaintiff's claim was purely speculative. *Ibid.*, 164. No such obstacles to the court's jurisdiction exist in the case at bar.

The attempt of the court below to create a distinction between private remedies and government remedies in

the absence of legislative enactment to that effect ignores the basis of the doctrine of the *Abilene* and *Merchants Elevator Co.* cases, under which the requirement of prior resort to the administrative body is founded upon the character of the function to be exercised, or upon the character of the controverted question and the nature of the inquiry necessary for its solution. *Great Northern Ry.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, 291. The character of the party plaintiff, whether private or governmental, is irrelevant. Cf. *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87. The seeming exception referred to in the *Keogh* case is not in reality an exception at all because it is founded not upon the character of the party plaintiff *per se*, but upon the character of the acts complained of as an instrument of injury. The distinction set up by the court below, founded upon the character of the party plaintiff as such, is both in logic and policy arbitrary and serves merely to rationalize an unsound conclusion.

In recalling the remedial situation existing prior to the passage of the Clayton Act (R. 57) the court did not go back far enough. If, as the court below held, the Shipping Act repealed or made inapplicable the remedial provisions of the Sherman and Clayton Acts, then the situation from the point of view of remedy becomes what it was before either the Sherman or Clayton Acts were passed and at that stage of development a private party could obtain an injunction against a group of ocean carriers giving preferential treatment in consideration of exclusive patronage. *Menacho* v. *Ward*, 1886, 27 Fed. 529.

Moreover, notwithstanding the jurisdiction of the Interstate Commerce Commission and its power to regulate and establish rail rates and practices, the courts have repeatedly held that state and federal common law and statutory provisions apply to and will be enforced by the courts against illegal practices at the instance of private parties.

*Penna. R. R.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121, 134, was an action in a state court for damages caused by the railroad's refusal to supply cars to a coal mine during a coal shortage in the proportion required by a state statute. The carrier had a rule which was in accordance with the statute, but it had not adhered to the rule. The defendant contended that the Interstate Commerce Commission alone had jurisdiction. This Court, however, found that on the issue thus raised the jurisdiction of the Interstate Commerce Commission was not exclusive of the jurisdiction of the court.

In *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70, this Court affirmed the jurisdiction of a state court to enjoin a railroad's refusal to ship beer in interstate commerce, holding that the railroad's refusal was a violation of the shipper's common law right to have his goods accepted by the carrier, even though he might have applied to the Interstate Commerce Commission for similar relief under the Interstate Commerce Act.

In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, this Court affirmed a judgment rendered by a state court against a carrier in favor of

a shipper for damages which might also have been recovered in proceedings before the Interstate Commerce Commission.

To the same effect are *Pennsylvania R. R.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120; *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184, 196-197, 209.

Indeed, the court below, in a decision rendered since its opinion in the case at bar, has held that the right of a private party to resort to the Interstate Commerce Commission for redress against discrimination does not oust the court of jurisdiction. *China Fire Ins. Co.* v. *Davis*, C. C. A. 2nd, 1931, 50 F. (2d) 389. In discussing the doctrine of prior resort to the regulatory body the court said:

> "Nor should the fact that a discrimination is involved put the matter exclusively in the hands of the Commission, any more than it does in the case of rebates. Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446; Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247, 266, 267, 33 S. Ct. 916, 57 L. Ed. 1472." Pp. 392-393.

If the analogy to land carriers which underlies the entire decision of the court below be sound, it follows that, as held in the dissenting opinion of Swan, J., such remedy as the petitioner may be entitled to obtain from the Shipping Board should be regarded as an additional remedy, not a remedy in substitution, for that which the petitioner is entitled to seek in the courts under the pre-existing anti-trust laws.

# PART III

## THE APPLICATION OF THE PRINCIPLE OF THE INTERSTATE COMMERCE ACT DECISIONS

### FIFTH POINT

THE COURT HAS JURISDICTION WITHOUT PRELIMINARY RESORT TO THE REGULATORY BODY IN THE ABSENCE OF A QUESTION OF AN ADMINISTRATIVE NATURE OR OF COMPLEX FACTS CALLING FOR EXPERIENCE IN TECHNICAL MATTERS.

The Circuit Court of Appeals held that the agreements set forth in the present bill, had they related to land carriers, would have had to be passed upon by the Interstate Commerce Commission before resort to the courts (R. 62), because of the assumed "tendency" of this Court to extend the requirement of preliminary resort to the Commission (R. 58, 60, 61). The cases referred to by the Circuit Court of Appeals, some of which the opinion relies on and some of which it distinguishes, are headed by *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426.

At the outset it should be observed that there are at least two fundamental differences between the *Abilene* case and the present case:

1. The *Abilene* case was an action at law to recover charges by the carrier under rates which the shipper claimed to be unreasonable, and had nothing to do with the Sherman Act; whereas the present action is brought under the Sherman Act to enjoin practices which are monopolistic and in restraint of trade, and in which rates enter merely incidentally.

2. In the *Abilene* case the rates had been established, filed with the Commission and published as required by the regulatory statute, and thus were held valid unless and until set aside by the Commission; whereas in the present case, the agreements, pursuant to which the acts complained of had been committed, have not been filed with or approved by the Shipping Board, and are *per se* illegal.

In the *Abilene* case and subsequent cases dealing with the same subject-matter, the rule has been laid down that the courts are ousted from their jurisdiction only in a limited class of cases by implication arising from the requirement of uniformity in matters involving the exercise of administrative discretion, or otherwise requiring the opinion of a body of experts. Where Congress has created an administrative body, such as the Interstate Commerce Commission, rights which necessarily involve such an exercise of administrative discretion are held to require presentation to the Commission, rather than to the courts.

Where, however, no such question is involved, the courts retain their jurisdiction without preliminary resort to the Commission. The line of demarcation between these two classes of cases was pointed out in *Great Northern Ry.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, where this Court found that preliminary resort to the Commission was necessary in three classes of cases, viz.: (1) where the function being exercised is, in its nature, administrative rather than judicial, *ibid.*, 291; (2) where, though the function is judicial, the character of the controverted question, and the nature of the inquiry necessary for its solution call for some exercise of administrative discretion or determination of fact from evidence necessarily complex and

requiring such acquaintance with the intricate facts of transportation as is commonly to be found only in a body of experts, *ibid.*, 291; (3) where the construction of a tariff or other written instrument requires proof of special meaning of words or phrases. *Ibid.*, 293.

At the end of the opinion Mr. Justice Brandeis referred to the asserted conflict of the cases collected in the footnote and said:

> "If in examining the cases referred to there is borne in mind the distinction above discussed between controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist." *Ibid.*, 295-296.

However, not every case which involves questions of fact requires preliminary resort to the regulatory commission. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 1926, 270 U. S. 266, is an instance of how far complex questions of fact will be taken up by the court and jurisdiction retained. *Ibid.*, 274.

## SIXTH POINT

THE QUESTIONS IN THIS CASE ARE NOT OF AN ADMINISTRATIVE CHARACTER AND THEIR ADJUDICATION DOES NOT REQUIRE REFERENCE EITHER TO ANY STANDARD OF FACTUAL REASONABLENESS OR TO ANY STANDARD OF THE WELFARE OF THE INDUSTRY.

A. *The complaint charges unjust discrimination in point of law.*

"Unjust discrimination may exist in law as well as in fact * * *," per Mr. Justice Brandeis, in *Chicago,*

*I. & L. Ry.* v. *U. S.*, 1926, 270 U. S. 287, at 293. It has been clearly established by the decisions of this Court in cases on matters subject to the Interstate Commerce Act that prior resort to an administrative body is not required in cases depending on questions of law. *Turner Lumber Co.* v. *C., M. & St. Paul Ry.*, 1926, 271 U. S. 259; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285; *Pennsylvania R. R.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120. The desideratum of uniformity is not jeopardized by the possibility of variant decisions of questions of law, because such decisions are always subject to final review by this Court. *Great Northern Ry. Co.* v. *Merchants Elevator Co., supra.*

Not only does the complaint charge unjust discrimination in point of law, but, as will be argued *infra,* factual reasonableness of the respondents' practices will be foreign to the issues before the trial court. The issues of fact, analyzed *infra,* pp. 43-44, will be simple ones with which judicial tribunals are accustomed to deal. The canons of judgment which the trial court will be called upon to exercise will be the normal ones exercised by courts and will not require a "special fact finding tribunal having an intimate acquaintance with the needs and practices of the business." On the contrary, the standard to which the tribunal will be required to refer the agreements and understandings is a standard more familiar to judicial than to administrative bodies.

B. *The trial court will not be called upon to determine the factual reasonableness of the rates, because both rates may lie within the zone of reasonableness and still involve unjust discrimination.*

The Circuit Court of Appeals held that "the gravamen of the cause of action in the case at bar was the

unreasonableness of the agreed rates of carriage, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission" (R. 63). This finding was expressly based on its adoption of the District Court's analysis of the charges in the amended bill (R. 63). This was to the effect that the means employed in the restraint and attempted monopoly alleged in the bill of complaint were chiefly unreasonably excessive differentials between the contract and open rates, and concluded:

> "Without a scale of unreasonably high tariff rates or unreasonably low contract rates, the differentials could not have existed as a device" (R. 43).

Hence, the reasoning of both courts below necessarily rests on the proposition that the gravamen of the cause of action is the unreasonableness of agreed rates of carriage. For this reason the courts below held that an administrative question was involved so as to bring the case within the analogy of the decisions of this Court construing the Interstate Commerce Act as requiring preliminary resort to the Commission. By the same token, if the gravamen of the complaint is not as found by the courts below, the case falls within the other class defined in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, in which prior resort to the Commission is not required.

This Court has pointed out exactly the respect in which the petitioner contends the courts below were in error in their analysis of the gravamen of the bill. *American Express Co.* v. *Caldwell*, 1917, 244 U. S. 617, 624.

That case involved the relation between interstate and intrastate rates, a situation similar to the relation between open tariff and exclusive patronage contract rates in this case. It was contended that discrimination necessarily depended on the unreasonableness of either one or both rates. On this point Mr. Justice Brandeis said:

> "But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination." P. 624.

It is true that the bill alleges that the differential between the open and contract rates was in many instances excessive and that the amount of the differential was arbitrary, wholly disproportionate to the difference in service rendered, and determined solely by a consideration of what differential would be effective in coercing a shipper to agree to refrain from making shipments by the petitioner's service (R. 8). These allegations as to rates and differentials, however, are merely descriptive of the means used to obtain monopoly of the trade, and the factual reasonableness of either the contract rate or the open rate or of the difference between them is not in issue as an essential part of the cause of action pleaded. The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by requiring exclusive patronage as the consideration for more favorable treatment. The rates may in fact be unreasonable in amount, but this is neither the basis nor a necessary element of the cause of action. As far as the petitioner is concerned, there is no objection to the combined lines fixing any rates

they choose for their contract and their general tariff business. The petitioner is solely concerned with and bases this portion of its complaint only upon the combined use by the respondents of the exclusive patronage contract and their joint refusal to carry at a given rate except in consideration of exclusive patronage, for the purpose of obtaining monopoly of the trade. The objectionable feature is the agreement not to ship by the petitioner's vessels being made the consideration for any inducement offered by the combination to their patrons.

Hence, in order to decide this case, the trial court is not required to formulate or apply any standard of factual reasonableness of rates; and in order to support the bill, so far as this point is concerned, it is necessary only to find a difference or spread between the two rates and a concerted effort to monopolize by the use of such spread as the means of obtaining exclusive patronage. Such an inquiry involves neither the exercise of administrative discretion nor investigation by any special tribunal having expert knowledge of the business.

C. *Similar attempts to obtain a monopoly by the device of exclusive patronage contracts have been condemned without it being considered necessary to pass on the question of reasonableness of the rates charged.*

1. At common law.

In *Menacho* v. *Ward,* 1886, 27 Fed. 529, the Ward Line exacted a higher rate from the plaintiff than was charged to other shippers who agreed to patronize the defendant's line exclusively. In condemning this practice and in enjoining the defendant from further par-

ticipation in it, Judge Wallace did not find it necessary to make any determination as to whether the rates charged were in themselves reasonable or not, but he condemned the device of a differential as a means of obtaining exclusive patronage with the intent to monopolize the trade. The court said:

> "The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively." P. 533.
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> * * * * * *
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> "The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer * * *. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious." P. 534.

2. Under the Sherman Act.

In *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87, this Court upheld an indictment against a combination of railroad and water carriers, who were charged with a violation of the anti-trust laws in conspiring to eliminate and destroy competition in the transportation of freight and passengers between various ports in the United States and British North America. It was charged that, with the purpose of obtaining an absolute monopoly over the trade passing through Skagway, the rates for freight and passengers were fixed and apportioned among the carriers constituting the combination, and that the railroad refused to enter into any joint through traffic arrangement with any other carriers or receive shipments from southern ports except such as arrived at Skagway by some ship belonging to one of the steamship companies. Also the company which controlled the wharves, pursuant to the combination, charged wharfage at the rate of $2 per ton for all cargo handled over its wharf, except where the same was shipped on a vessel owned by one of the companies which formed the combination, or was consigned to persons who bound themselves to ship exclusively by the steamship companies, in which case wharfage of $1 per ton was charged.

The District Court, relying on the *Abilene* case, held that it was without jurisdiction to entertain the questions involved in either a criminal or a civil proceeding until the matters of discrimination between carriers or shippers or the giving or refusing of joint traffic arrangements should have been submitted to and passed on by the Interstate Commerce Commission. Pp. 100-101. In reversing this decision this Court expressly

found that it was unimportant to determine whether the charges for wharfage were reasonable or unreasonable, and said:

> "Whether $2.00 per ton (the rate charged to independent lines as against $1.00 per ton charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co.* v. *United States, supra*), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such." P. 105.

*United States* v. *Great Lakes Towing Co.*, 1913, 208 Fed. 733; 1914, 217 Fed. 656, was an action in equity under the Sherman Act against a combination of towing and wrecking companies which the court found controlled a virtual monopoly of that business on the Great Lakes except Lake Ontario. The practice principally complained of was a system by which, in consideration of the customer's exclusive use of the combination's tug and wrecking service at all ports covered by its tariffs, the combination gave a discount of from 20 to 30 per cent. from its tariff rates. No discounts were allowed except under such exclusive contract.

The circuit judges, sitting as the District Court, having found the exclusive contract system, involving

differentials between tariff and contract rates, to be a violation of the Sherman Act when used in pursuance of a scheme to eliminate competition and obtain a monopoly, granted an injunction forbidding the use of such exclusive contracts. *Id.*, 217 Fed. 656, 661.

It is noteworthy that in that case the court did not find it necessary to consider whether the tariff rates were too high, or the discount, given in consideration of exclusive contracts, was too low; but declared the scheme illegal under the anti-trust laws because the device, employed as a means of creating a monopoly, rendered the practice illegal. Cf. *Thomsen* v. *Cayser*, 1917, 243 U. S. 66.

3. Under the Shipping Act.

Moreover, the Shipping Board itself, in its decision in *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41, set forth in full as Appendix A in the *Amended Bill of Complaint* (R. 30-39), condemned the exaction of exclusive patronage contracts by means of a differential, without inquiring into the reasonableness or unreasonableness of either the contract or the tariff rates. In that case, the carrier, in order to obtain a monopoly between New Orleans and Bluefields, exacted a differential of 25 per cent. in consideration solely of the shipper's exclusive patronage. The Shipping Board, quoting extensively from *Menacho* v. *Ward*, 1886, 27 Fed. 529, condemned the practice, without regard to the reasonableness of the rates used as a means of carrying it out, on the ground that the practice violated not only the common law, but also Sections 16 and 17 of the Shipping Act.

Surely if the regulatory body itself has condemned the identical practice charged in the amended bill in the present case, without inquiring into the reasonableness of the rates, it cannot be said that the present case requires any determination of reasonableness of rates. For the spread between the contract and tariff rates is "undue" not because of the amounts of the different classes of rates, as thought by the courts below to be the test, but because the lower rate is conditioned upon exclusive patronage. This is a simple issue, not requiring the exercise of any administrative discretion, the construction of any technical terms, or the special knowledge of any body of technical experts, and therefore it is within the jurisdiction of the court to determine without preliminary resort to any administrative body.

D. *The only issues requiring inquiry and determination by the trial court are of a proper character to be tried by a judicial tribunal.*

While it is impossible to know what, if any, will be the issues for trial, in the absence of an answer to the amended complaint, in order to state the strongest possible case against the jurisdiction of the District Court, we will assume that each and every material allegation in the amended complaint will be denied, and then consider what will be the character of the controverted question within the test set out in the *Merchants Elevator Co.* decision. A mere statement of those issues is a striking argument in favor of their judicial, as distinguished from administrative, character. They are:

1. The mere *existence* of concerted action among the respondents.

2. The mere *existence* of sufficient overt acts to show an intent to monopolize.

3. The mere *existence* of two rates and joint refusal to carry at the lower rate except in consideration of an exclusive patronage contract.

4. The mere *existence* of coercion of shippers by joint exclusive patronage contracts.

5. The mere *use* of other particular means for the purpose of driving the petitioner out of the trade, which means are unjust and discriminatory in point of law; although the bill should be sustained if no proof were offered of such other means.

6. The mere *lack* of approval by the Shipping Board of the agreements and understandings between the respondents to obtain monopoly by the foregoing means.

To comment further on the judicial character of these issues would only be to state the obvious. The courts below ignored the truth that it is just as much a part of the so-called *Abilene* philosophy that judicial questions are within the jurisdiction of the courts as that administrative questions are not.

E. *The standard to which the conduct of the respondents must be referred does not require investigation by a body of experts.*

The court below argues that Congress has set up a standard for agreements in the shipping business the test of which is whether it injures the welfare of the industry, and concludes that the application of such a

test "requires a special fact finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry" (R. 64).

The fallacy in the decision below lies in a misconstruction of the gravamen of the plaintiff's bill and in an inadequate analysis of the Shipping Act, forcing the plaintiff to rely upon the standard of the welfare of the industry, whereas the agreements and understandings alleged are invalid under other standards quite apart from that particular standard. As a result of such reasoning and by applying but one phase of the supposed analogy to the interstate commerce cases, the courts below reached the conclusion that although the bill stated a cause of action under the Sherman Act, it was without the jurisdiction of the District Court.

The Shipping Act, Section 15, *U. S. Code,* Ti. 46, §814 (set out in full in Appendix A), second paragraph, sets out three standards for agreements in the shipping business; and an agreement violating any one of them is condemned:

(a) Agreements which the Board finds to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."

(b) Agreements which the Board finds "to operate to the detriment of the commerce of the United States."

(c) Agreements "in violation of this chapter." This includes unfiled and unapproved agreements, such as are involved in this case.

It is obvious that standard (a) is the well-defined standard of the common law and of the Sherman Act. A reading of *U. S. Code,* Ti. 46, §812, makes this equally clear of standard (c). As has been shown in the analysis of the gravamen of the complaint, the agreements and understandings alleged are invalid as a matter of law under standards (a) and (c), the standards of the common law and of the Sherman Act, apart from any question of incidental unreasonableness, and apart from any question of incidental injury to the welfare of the industry. Each standard is a criterion not of validity but of invalidity. An agreement to be valid, must meet the requirements of all three standards.

The reliance by the court below on a "standard of the industry" hypothetically different from the accepted standards of the common law and Sherman Act, as being the sole criterion of the respondents' conduct, is open to the further objection that if the Shipping Act could be interpreted as permitting as lawful under the "standard of the industry" acts which were *per se* unjustly discriminatory or unfair as judged by well-settled principles of law, the act fails to set up a standard for the guidance of the administrative board sufficiently certain to bring the delegation to it of legislative power within constitutional limits. *United States* v. *Cohen Grocery Co.,* 1921, 255 U. S. 81; Cf. *Turner Lumber Co.* v. *C., M. & St. P. Ry.,* 1926, 271 U. S. 259. This point is more fully discussed *infra,* pp. 47-49.

## SEVENTH POINT

IRRESPECTIVE OF WHETHER THIS CASE PRESENTS ANY QUESTIONS OF AN ADMINISTRATIVE NATURE OR COMPLEX FACTS CALLING FOR EXPERIENCE IN TECHNICAL MATTERS, THE COURT HAS JURISDICTION WITHOUT PRELIMINARY RESORT TO THE SHIPPING BOARD.

A. *The agreements and understandings complained of could not legally be approved by the Shipping Board.*

While it is true that the language of Section 15 of the Shipping Act as to the powers of the Board to approve or disapprove the agreements filed with it by carriers is broad in its terms, nevertheless it imposes standards which the administrative board cannot transcend without its acts becoming a nullity. Clearly the Shipping Board in passing upon agreements filed with it, though not in terms forbidden to do so, cannot approve an agreement for "fighting ships," deferred rebates, or other forms of discrimination and unfair practices which Congress has expressly prohibited in terms in Section 14 of the Shipping Act, *U. S. Code*, Ti. 46, §812, even though the Board should regard them as promoting the welfare of the industry. The provision of the second paragraph of Section 15 of the Shipping Act that the "board may by order disapprove" agreements for discriminatory and unfair practices, may be permissive in terms but is mandatory in effect. *United States Sugar Equalization Board* v. *P. deRonde & Co.*, C. C. A. 3rd, 1925, 7 F. (2d) 981, 986; *Goodbody* v. *Pennsylvania R. Co.*, C. C. A. 6th, 1928, 29 F. (2d) 67, 69.

The terms "unjustly discriminatory" and "unfair," the standards expressly set up for the action of the

Shipping Board, are terms with well established meanings in that branch of the common law which deals with discrimination and unfair competition, as well as under the decisions dealing with statutory regulation of public enterprise. The Shipping Board could not approve of the combination and conspiracy to monopolize by means of the unfair and discriminatory practices set forth in the complaint without wholly ignoring the standards within the limits of which it must exercise its discretion.

The court below adopted an unsound criterion of the respondents' acts by relying exclusively upon a "standard of the industry" hypothetically different from the accepted standards of the common law and Sherman Act. For if the Shipping Act could be interpreted as permitting the Board to approve and make lawful acts which are *per se* "unjustly discriminatory" or "unfair" by well settled principles of law, as are the acts here complained of, then under such a construction the act wholly fails to set up a standard for the guidance of the administrative board sufficiently certain to bring the legislative power within constitutional limits. *United States* v. *Cohen Grocery Co.*, 1921, 255 U. S. 81 (holding void Section 4 of the Lever Act); and the seven cases following, decided on the authority thereof. 255 U. S. 98, 100, 102, 104, 106, 108, 109. *Cline* v. *Frink Dairy Co.*, 1927, 274 U. S. 445 (holding the Colorado Anti-Trust Law void for failing to contain a fixed standard of guilt). The doctrine of those cases has not been confined to criminal cases but has been applied to civil proceedings as well. *Small Co.* v. *Am. Sugar Ref. Co.*, 1925, 267 U. S. 233, 239.

The agreements and understandings alleged in the complaint could be approved by the Shipping Board

only by the application of a standard which would be so indefinite as to render the Shipping Act unconstitutional. The dissenting opinion of Judge Swan in the court below therefore correctly held that

> "In the case at bar, however, the agreement complained of has not been, and cannot legally be, approved by the Shipping Board" (R. 71).

This constitutional aspect of the decision below raises a pure question of law which is in itself sufficient to confer jurisdiction on the court without preliminary resort to the Shipping Board by analogy to the Interstate Commerce Act. *Turner Lumber Co.* v. *C., M. & St. P. Ry.*, 1926, 271 U. S. 259, 262.

B. *Refusal to carry at a given rate except in consideration of exclusive patronage has already been held unlawful by the Board.*

It is established by the decisions under the Interstate Commerce Act that it is unnecessary to resort to an administrative tribunal where that body has already in another proceeding held illegal the practice complained of, even though the lawfulness of that practice may involve in the first instance the reasonableness of rates or other matters within the primary jurisdiction of the regulatory body. These cases proceed on the theory that even though the exercise of administrative discretion may be required to determine the status of the particular rate, rule or practice, nevertheless it is not necessary to require preliminary resort to the administrative tribunal in cases where that tribunal has already exercised the necessary administrative discretion. *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, C. C. A.

7th, 1914, 211 Fed. 65, 71-73; see *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247, 257.

In *Mitchell Coal Co.* v. *Penna. R. R. Co.* this Court held on one branch of the case that the reasonableness of payments made for lateral transportation of coal from the mine to the railroad was an administrative question which, under the *Abilene* case, must first be passed upon by the Interstate Commerce Commission. But the Court said:

> "When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice." P. 257.

In *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, C. C. A. 7th, 1914, 211 Fed. 65, the defendant carrier demurred on the ground that the allegations of the complaint, which charged that the Interstate Commerce Commission in another proceeding by different shippers had found the rate in question to be unreasonable, were insufficient to relieve the plaintiff from the duty of submitting its claim to the Commission before bringing action in the federal court.

In overruling the demurrer on the ground that preliminary resort to the Commission was not necessary, the Circuit Court of Appeals said:

> "This must be the result because, on the basis that all legislative functions have been completely and explicitly exercised, there would be nothing for the commission to do for an injured shipper except to apply to his particular facts the uni-

versal law, and that can be done as well in court without disturbing or obstructing the act's cardinal purposes of uniformity and equality in the legislative subject-matter of rates and practices." P. 72.

* * * * * *

"This action of the commission made the statutory standard of just rates as definite and positive as if Congress itself in the act had forbidden this particular discrimination and had commanded that the through rates should be applied to all such shipments. That is, all legislative and quasi legislative functions necessary to complete operativeness of the act having been exercised, it was open to any shipper who was given a cause of action by section 8 to present his particular facts either to the commission or to a federal District Court under section 9." P. 73.

The Shipping Board itself has already determined that the use of exclusive contracts, similar to those involved in the case at bar but attended by much less vicious coercion, are unlawful under the Shipping Act. *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41 (R. 30-39). In that case shippers were offered two rates. The consideration for the lower was the shipper's agreement to patronize the carrier exclusively in connection with all freight shipped or controlled by him between New Orleans and the carrier's Nicaraguan ports of call. The complainants refused to enter into such an agreement because they wished to avail themselves of the services of other carriers, and were consequently denied the lower rates.

The Shipping Board held that the question for determination was similar to that in *Menacho* v. *Ward*, *supra*. Quoting from the opinion in that case, the Ship-

ping Board pointed out that the vice of the discrimination is that it is calculated to coerce all those who have occasion to employ common carriers between the ports in question from employing such agencies as may offer; that its tendency is to deprive the public of legitimate opportunities to obtain carriage on the best terms; that if tolerated the result in practice will be to give a monopoly of the carrying trade between these places; and that manifestly the discrimination existed in order to discourage all others from attempting to serve the public as carriers between these places.

The Shipping Board concluded that the practice of giving lower rates to shippers in consideration of their agreement to ship exclusively by the defendant line was in violation not only of the common law but of the provisions of the Shipping Act, as follows:

> "It is manifest, therefore, that regardless of how desirable the giving of lower rates to those shippers who agreed to ship exclusively via its line might be to the respondent from the standpoint of business expediency, such practice was violative of the common law because of the absence of any proper consideration. For another reason, as will hereafter be shown, such practice was also violative of provisions of the Federal shipping act as constituting undue discrimination between shippers" (R. 35).
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> * * * * * *
>
> "After full consideration of all the facts and evidence of record, the board concludes and decides that the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved in this case subjected the complainants to undue and unreasonable prejudice and disadvantage, and

constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the shipping act" (R. 39).

Thus the basis upon which these contracts were secured in the *Eden* case is identical with that in the case at bar, i. e., shippers must contract to give to the carriers all shipments made or controlled by them, without reference to regularity of shipment, the number of shipments made, or the amount of tonnage offered during the particular year. Hence, no sound distinction may be based on the words "under the circumstances involved in this case" in the opinion. Indeed, the present case is stronger because in the *Eden* case there was only one carrier while here there are a large number acting in concert.

The difficulty thought by the court below to exist, as to whether the Eden Mining Company decision created a precedent binding upon the Shipping Board (R. 68), is in reality non-existent when the clear principle which the Shipping Board applied in that case is kept in mind.

Therefore, even if it be considered that any question of administrative discretion with respect to the exclusive contract practice existed, such discretion has been exercised already by the Shipping Board. This in itself, irrespective of other considerations, is sufficient to make preliminary resort to the Shipping Board unnecessary.

C. *The acts complained of are unlawful by the express terms of the Shipping Act itself.*

There is no necessity dictated by the plan and scope of the Interstate Commerce Act to resort to the regula-

tory body where the acts complained of are made unlawful expressly by the regulatory statute because the function to be exercised is purely judicial.

Thus, in *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184, it appeared that the railroad paid a rebate from its published tariff to certain shippers. The payment of rebates was declared unlawful by the Interstate Commerce Act. This Court held that under these circumstances there was no need to take the matter to the Interstate Commerce Commission in the first instance, laying down the rule as follows:

> "In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class." P. 197.

Again, in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247, this Court held that rebates might properly be dealt with by the court without preliminary resort to the Interstate Commerce Commission, because:

> "* * * the so-called allowance, regardless of the amount, was a mere gift—a rebate, abso-

> lutely forbidden by the statute and *ipso facto* illegal. Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured." P. 266.

Similarly, in *American R. Co.* v. *South Porto Rico Sugar Co.*, C. C. A. 1st, 1923, 293 Fed. 670, where a statute required all railroad charges to be filed with and approved by the Public Service Commission, and declared unlawful charges not so filed and approved, the Circuit Court of Appeals held that charges not so filed and approved were clearly unlawful and therefore their enforcement might be enjoined by a court of equity without prior resort to the Commission. In this connection the court said:

> "The principal question in the case is that raised under the last assignment of error, as to whether the greasing charges are illegal; they not having been included in any tariff of rates or charges posted and filed by the defendant with the Public Service Commission of Porto Rico and with its approval. If they are illegal, the complainant may enforce its right in any court having jurisdiction of the matter, without a preliminary decision to that effect by the Public Service Commission of Porto Rico. *Mitchell* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 266, 33 Sup. Ct. 916, 57 L. Ed. 1472; *People of Porto Rico* v. *American R. R. Co. of Porto Rico*, 254 Fed. 369, 378, 165 C. C. A. 589." P. 674.

The amended bill sets forth in detail a number of overt acts which it charges were committed by the com-

bined lines in furtherance of their combination and conspiracy to deprive the petitioner of participation in the trade, such as agreements to give rebates, inducing cancellation of contracts of certain shippers, compelling important shippers to disregard instructions by the owners of the goods to ship their purchases by vessels of the petitioner, manipulating the ocean and contract rates for the purpose of coercing shippers into making exclusive patronage contracts with the combined lines, circulating misrepresentations concerning contracts with combined lines and concerning discontinuance of the petitioner's service, and the like (R. 22-27).

Aside from any of the allegations just referred to, these agreements and understandings which have been entered into since the passing of the Shipping Act and have not been filed with or approved by the Board (R. 27) are expressly declared to be unlawful by Section 15 of the Shipping Act.

As they are thus illegal *per se* under the express terms of the Shipping Act, the petitioner should be entitled to enforce its remedies in the District Court without a preliminary decision to that effect by the regulatory commission. The fact that the agreements and understandings, and also many other acts, complained of are unlawful by the terms of the Shipping Act itself, is a sufficient reason, not for refusing, but for retaining jurisdiction.

## LAST POINT

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED WITH COSTS IN ALL COURTS, AND THE CAUSE REMANDED WITH DIRECTIONS TO DENY THE MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT.

New York, December 26, 1931.

Respectfully submitted,

MARK W. MACLAY,
JOHN TILNEY CARPENTER,
Counsel for Petitioner.

# APPENDIX A

## SHERMAN ACT, SECS. 1 & 2

(Act of July 2, 1890, c. 647, §§1 & 2, 26 Stat. 209; U. S. Code, Ti. 15, §§1 & 2)

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

## CLAYTON ACT, SEC. 16

(Act of Oct. 15, 1914, c. 323, §16, 38 Stat. 737; U. S. Code, 1926, Ti. 15, §26)

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of

proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

## SHIPPING ACT, 1916, SEC. 15

(Act of Sept. 7, 1916, c. 451, §15, 39 Stat. 733; U. S. Code, 1926, Ti. 46, §814)

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner

providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, en-

titled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.